Bank of Commerce (M) Bhd v Mahajaya Property Sdn Bhd

HIGH COURT (MELAKA) — CIVIL SUIT NO 22-6 OF 1996
AUGUSTINE PAUL JC
20 AUGUST 1997

***Contract** — Assignment — Absolute assignment — Whether use of word 'absolutely' in an assignment would render the assignment absolute — Whether notice of the assignment to the debtor must be given by the assignor only — Whether sufficient notice was given — Whether presence of clauses which refer to the assignor's rights can alter the absolute nature of an assignment — Civil Law Act 1956 s 4(3)*

The assignor and the defendant entered into an agreement for the construction of certain buildings. Under the agreement, the defendant was required to pay the assignor a sum of RM16.4m for carrying out the works, and paid the assignor a portion of this amount. To finance the completion of the works, the assignor received a loan from the plaintiff, which was granted subject to the assignor assigning the balance of the contract sum to the plaintiff as security and towards repayment of the loan with interest. The parties executed the deed of assignment ('the assignment') on 2 November 1993.

On the same day, the defendant and the assignor entered into a supplementary agreement ('the supplementary agreement') in which the defendant was notified as to the loan arrangement with the plaintiff, the assignment between the parties, and the fact that payments were to be deposited into a special account. The defendant failed to make several payments, prompting the plaintiff to sue for the amount owed. After the defendant entered its defence, the plaintiff filed an application for summary judgment which was dismissed. The plaintiff appealed.

The sole issue before the court was whether the assignment entered into by the plaintiff and the assignor was absolute within the meaning of s 4(3) of the Civil Law Act 1956. The relevant clauses before the court were cll 1, 9, 18 and 20 of the assignment. Clause 1 provided that the assignor absolutely assigned to the plaintiff the balance of the contract sum until the full amount of the loan and all interest thereon shall be fully paid and satisfied. The plaintiff argued that the use of the word 'absolutely' in cl 1 showed that the assignment was absolute. The defendant however argued that cll 9, 18 and 20 supported the opposite, as these clauses authorize the plaintiff to use the name of the assignor as plaintiff or co-plaintiff, and appoint the plaintiff as the attorney of the assignor to institute proceedings against the defendant, which indicated that the assignment was not meant to be absolute. Additionally, the defendant argued that the notice issued by the plaintiff to the defendant of the assignment was defective because the notice must be issued by the assignor, and further claimed that the supplementary agreement did not constitute notice as required under s 4(3).

Held, dismissing the appeal:

(1) The supplementary agreement was sufficient notice under s 4(3). The defendant's arguments that the notice was defective in that it was not issued by the assignor and that the supplementary agreement did not constitute notice were unsupported by the facts and the law; s 4(3) does not state that a particular party must issue the notice, and contrary to the defendant's statements, the supplementary agreement did in fact constitute proper notice (see pp 631E–I and 632A–C); *Bateman v Hunt* [1904] 2 KB 530; *UMW Industries (1985) Sdn Bhd v Ah Fook @ Chin Kim Fook* [1996] 1 CLJ 379; *Curran v Newpark Cinemas Ltd* [1951] 1 All ER 295 and *James Talcott Ltd v John Lewis & Co Ltd and North American Dress Co Ltd* [1940] 3 All ER 592 followed.

(2) The words in cl 1 showed that the assignment was to continue only till the full repayment of the loan and interest. On repayment of the loan and interest, the assignment would come to an end. The repayment of the loan advanced was an uncertain event and would make the assignment conditional. This would involve the defendant in the state of the accounts between the plaintiff and the assignor. Accordingly, the assignment was not absolute (see p 636D–E); *Durham Brothers v Robertson* [1898] 1 QB 765 followed.

Per curiam:

The wording of cll 9, 18 and 20 could not be used to alter the absolute nature of an assignment if it could be established from the other circumstances of the case that the assignment was in fact absolute. This is for the reason that the right of an assignee to sue in his own name is statutorily given in s 4(3) when the required conditions for the existence of an absolute assignment are present. In that event, the two clauses would be superfluous and serve no useful purpose as the only person who could maintain an action would be the assignee as the entire rights and interests of the assignor would have been transferred unconditionally to him thereby rendering the powers contained in the clauses ineffective. This would be inevitable as an assignor has no right to sue in his own name where there has been an absolute assignment of his rights (see p 635D–G); *Bank of Tokyo Ltd v Mohd Zaini bin Arshad (Maria Pragasam, Intervener)* [1991] 3 MLJ 50; *Hughes v Pump House Hotel Co* [1902] 2 KB 190 and *Khaw Poh Chhuan v Ng Gaik Peng & Yap Wan Chuan & Ors* [1996] 1 MLJ 761 followed.

[Bahasa Malaysia summary

Penyerahhak dan defendan telah mengikat suatu perjanjian untuk pembinaan bangunan tertentu. Di bawah perjanjian tersebut, defendan dikehendaki membayar jumlah sebanyak RM16.4 juta kepada penyerahhak untuk kerja-kerja yang dijalankan, dan telah membayar sebahagian amaun ini kepada penyerahhak. Bagi membiayai penyelesaian kerja-kerja, penyerahhak telah menerima

pinjaman daripada plaintif, yang diberikan tertakluk kepada penyerahhak menyerahhak baki jumlah kontrak kepada plaintif sebagai cagaran dan terhadap bayaran balik pinjaman dengan faedah. Pihak-pihak telah melaksanakan suratikatan penyerahhakan ('penyerahhakan tersebut') pada 2 November 1993. A

Pada hari yang sama, defendan dan penyerahhak telah mengikat suatu perjanjian tambahan ('perjanjian tambahan tersebut') dalam mana defendan diberitahu tentang aturan pinjaman dengan plaintif, penyerahhakan tersebut antara pihak-pihak, dan fakta bahawa bayaran hendaklah didepositkan ke dalam suatu akaun khusus. Defendan telah gagal membuat beberapa bayaran, yang menyebabkan plaintif mendakwa atas amaun yang terhutang. Selepas defendan memasukkan pembelaan, plaintif memfailkan permohonan untuk penghakiman terus yang telah ditolak. Plaintif membuat rayuan. B C

Isu tunggal di hadapan mahkamah adalah sama ada penyerahhakan yang diikat oleh plaintif dan penyerahhak adalah muktamad menurut maksud s 4(3) Akta Undang-Undang Sivil 1956. Fasal-fasal yang relevan di hadapan mahkamah adalah fasal-fasal 1, 9, 18 dan 20 penyerahhakan tersebut. Fasal 1 memperuntukkan bahawa penyerahhak telah menyerahhak baki harga kontrak secara muktamad kepada plaintif sehingga amaun penuh pinjaman dan segala faedah atasnya telah dibayar dan dipuaskan sepenuhnya. Plaintif menghujahkan bahawa penggunaan perkataan 'muktamad' dalam fasal 1 menunjukkan bahawa penyerahhakan tersebut adalah muktamad. Walau bagaimanapun, defendan berhujah bahawa fasal 9, 18 dan 20 menyokong hujah sebaliknya, kerana fasal-fasal ini membenarkan plaintif mengguna nama penyerahhak sebagai plaintif atau plaintif bersama, dan melantik plaintif sebagai wakil penyerahhak bagi memulakan prosiding terhadap defendan, yang menunjukkan bahawa penyerahhakan tidak bertujuan untuk menjadi muktamad. Tambahan lagi, defendan menghujahkan bahawa notis yang dikeluarkan oleh plaintif kepada defendan tentang penyerahhakan tersebut adalah cacat sebab notis mestilah dikeluarkan oleh penyerahhak, dan selanjutnya mendakwa bahawa perjanjian tambahan tersebut tidak merupakan notis sebagaimana yang diperlukan di bawah s 4(3). D E F G

Diputuskan, menolak rayuan:

(1) Perjanjian tambahan adalah mencukupi bagi tujuan s 4(3). Hujah defendan bahawa notis itu adalah cacat dalam ertikata ia tidak dikeluarkan oleh penyerahhak dan bahawa perjanjian tambahan tidak merupakan notis tidak disokong oleh fakta-fakta dan undang-undang; s 4(3) tidak menyatakan bahawa suatu pihak tertentu mesti mengeluarkan notis, dan berlawanan dengan pernyataan defendan, perjanjian tambahan tersebut pada hakikatnya merupakan notis yang wajar (lihat ms 631E–I dan 632A–C); *Bateman v Hunt* [1904] 2 KB 530; *UMW Industries (1985) Sdn Bhd v Ah Fook @ Chin Kim Fook* [1996] 1 CLJ 379; *Curran v* H I

Newpark Cinemas Ltd [1951] 1 All ER 295 dan *James Talcott Ltd v John Lewis & Co Ltd and North American Dress Co Ltd* [1940] 3 All ER 592 diikut.

(2) Perkataan-perkataan dalam fasal 1 menunjukkan bahawa penyerahhakan harus diteruskan sehingga bayaran balik penuh pinjaman dan faedah. Apabila pinjaman dan faedah dibayar balik, penyerahhakan akan tamat. Pembayaran balik pinjaman yang dibuat merupakan peristiwa tidak tertentu dan akan menyebabkan penyerahhakan menjadi bersyarat. Ini akan melibatkan defendan dalam akaun antara plaintif dan penyerahhak. Lantaran itu, penyerahhakan adalah tidak mutlak (lihat ms 636D–E); *Durham Brothers v Robertson* [1898] 1 QB 765 diikut.

Per curiam:

Susunan kata fasal-fasal 9, 18 dan 20 tidak boleh digunakan bagi menukar sifat mutlak suatu penyerahhakan jika ia boleh dibuktikan daripada keadaan lain kes bahawa penyerahhakan itu pada hakikatnya adalah mutlak. Ini adalah disebabkan hak seseorang pemegang serahhak untuk mendakwa atas nama sendiri diberikan secara berkanun dalam s 4(3) apabila syarat yang dikehendaki untuk kewujudan penyerahhakan mutlak dipenuhi. Jika itu berlaku, kedua-dua fasal tidak diperlukan dan tidak berguna kerana satu-satunya orang yang boleh mengekalkan tindakan adalah pemegang serahhak memandangkan kesemua hak dan kepentingan penyerahhak dipindah tanpa syarat kepadanya lalu menyebabkan kuasa yang terkandung dalam fasal menjadi tidak berkesan. Ini tidak dapat dielakkan disebabkan penyerahhak tidak berhak mendakwa atas nama sendiri di mana terdapat penyerahhakan muktamad atas haknya (lihat ms 635D–G); *Bank of Tokyo Ltd v Mohd Zaini bin Arshad (Maria Pragasam, Intervener)* [1991] 3 MLJ 50; *Hughes v Pump House Hotel Co* [1902] 2 KB 190 dan *Khaw Poh Chhuan v Ng Gaik Peng & Yap Wan Chuan & Ors* [1996] 1 MLJ 761 diikut.]

Notes

For cases on assignment, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1153–1174.

Cases referred to

Bank Bumiputra Malaysia Bhd & Anor v Lorrain Esme Osman & Ors [1987] 1 MLJ 502 (refd)

Bank of Tokyo Ltd v Mohd Zaini bin Arshad (Maria Pragasam, Intervener) [1991] 3 MLJ 50 (folld)

Bank of Liverpool and Martins Ltd v Holland (1926) 43 TLR 29 (refd)

Bateman v Hunt [1904] 2 KB 530 (folld)

Burlinson v Hall [1884] 12 QBD 347 (refd)

Chartered Bank, The v Rashid bin Mohamed [1986] 2 MLJ 219 (folld)

Comfort v Betts [1891] 1 QB 737 (refd)

Compania Colombiana de Seguros v Pacific Steam Navigation Co [1965] 1 QB 101 (refd)

Curran v Newpark Cinemas Ltd [1951] 1 All ER 295 (folld)
Durham Brothers v Robertson [1898] 1 QB 765 (folld)
Fitzroy v Cave [1905] 2 KB 364 (refd)
Grey v Australian Motorists & General Insurance Co Pty Ltd (1976) 1 NSWLR 669 (refd)
Harding v Harding [1886] 17 QBD 442 (refd)
Hipparion (M) Sdn Bhd v Chung Khiaw Bank Ltd [1989] 2 MLJ 149 (refd)
Holt v Heatherfield Trust Ltd [1942] 2 KB 1 (refd)
Hughes v Pump House Hotel Co [1902] 2 KB 190 (folld)
James Talcott Ltd v John Lewis & Co Ltd and North American Dress Co Ltd [1940] 3 All ER 592 (folld)
Kelo, The [1985] 2 Lloyd's Rep 85 (refd)
Khaw Poh Chhuan v Ng Gaik Peng & Yap Wan Chuan & Ors [1996] 1 MLJ 761 (folld)
Mercantile Bank of London v Evans [1899] 2 QB 613 (refd)
Nouvau Mont Dor (M) Sdn Bhd v Faber Development Sdn Bhd [1984] 2 MLJ 268 (refd)
Tancred v Delagao Bay and East Africa Railway Co (1889) 23 QBD 239 (refd)
UMW Industries (1985) Sdn Bhd (formerly known as UMW (Malaya) Sdn Bhd) v Ah Fook @ Chin Kim Fook [1996] 1 CLJ 379 (folld)
United Malayan Banking Corp Bhd v Aluminex (M) Sdn Bhd & Anor [1993] 3 MLJ 587 (refd)
Van Lynn Developments Ltd v Pelias Construction Co Ltd [1969] 1 QB 607 (refd)
Walter & Sullivan Ltd v J Murphy & Sons Ltd [1955] 1 All ER 843 (refd)
Westerton, Re, Public Trustee v Gray [1919] 2 Ch 104 (refd)

Legislation referred to

Civil Law Act 1956 s 4(3)
Judicature Act 1873 s 25(6) [UK]
Law of Property Act 1925 s 136 [UK]

Kee Tong Kiat (*Nik Hussain & Partners*) for the plaintiff.
K Balaguru (*K Balaguru*) for the defendant.

Augustine Paul JC: The predominant issue for determination in this appeal from the decision of the learned senior assistant registrar ('the SAR') is whether the deed of assignment executed on 2 November 1993 ('the assignment') between Sepakat Tinggi Sdn Bhd ('the assignor') and Bank of Commerce (M) Bhd ('the plaintiff') is absolute within the meaning of s 4(3) of the Civil Law Act 1956 ('s 4(3)').

On 29 September 1992, the assignor entered into an agreement ('the agreement') with Mahajaya Property Sdn Bhd ('the defendant') for the construction of certain buildings. Under the agreement, the defendant was required to pay the assignor a sum of RM16.4m ('the contract sum') for carrying out the works. Pursuant to the agreement, the defendant had paid

A the assignor a sum of RM9.8m leaving a balance sum of RM6.6m. The assignor then requested for a loan of RM2m from the plaintiff to part finance the completion of the agreement and the plaintiff agreed to grant a loan to the assignor up to 31 March 1994 subject to the assignor assigning the balance of the contract sum to the plaintiff as security and towards repayment of the loan with interest. Subsequently, the parties B entered into the assignment. I shall now reproduce certain clauses of the assignment which I consider to be material:

(1) In consideration of the bank granting the loan to the assignor, receipt of which sum the assignor hereby acknowledges, the assignor hereby absolutely assigns to the bank the balance of the contract sum to hold C the same unto the bank absolutely until the full amount of the loan and all interest thereon shall be fully paid and satisfied

(3) The assignor shall open a project account with the bank ('the project account') and the balance of the contract sum shall be paid into the project account to facilitate the repayment of the loan. The assignor hereby agrees and authorizes the bank to deduct 30% of each payment D made into the project account towards repayment of the loan until the loan and all interest thereon shall be fully paid and satisfied. In the event the balance of the contract sum is less than RM6.6m the bank shall be entitled to deduct a higher percentage than 30% of each payment made into the project account towards repayment of the loan

E (5) It is hereby agreed that the receipt of the bank of the balance of the contract sum shall be a good discharge to the said Mahajaya Property Sdn Bhd for the balance of the contract sum hereby assigned or any part thereof and that all sums which may be paid hereunder by the said Mahajaya Property Sdn Bhd to the Bank shall be appropriated towards the reduction and satisfaction of the assignor's debt with the bank provided always any money received hereunder may be placed and kept F to the credit of the assignor in a suspense account for so long as the bank shall think fit to be applied towards the discharge of any monies or liabilities due or incurred by the assignor to the bank.

(9) The assignor hereby authorizes and shall at his/their own expense execute all such documents and do all such things as the bank may G request to enable the bank to take such steps and proceedings as the bank may consider desirable to enable the bank to obtain payment of the balance of the contract sum. In particular, the assignor hereby lends and shall lend his/their name if required by the bank as plaintiff or co-plaintiff in any proceedings the bank may wish to institute against the said Mahajaya Property Sdn Bhd for the payment of the balance of the H contract sum.

(10) Save as aforesaid, the assignor will not unless specifically requested by the bank in writing be concerned in or attempt the collection of the balance of the contract sum.

(11) The assignor will not attempt to issue any receipt to the said Mahajaya Property Sdn Bhd in respect of any payment made by the said Mahajaya I Property Sdn Bhd. Where such receipt is specifically required, the request should be advised to the bank who will endeavour to furnish such receipt, if appropriate.

(12) If the payment of the balance of the contract sum or any part thereof is made by the said Mahajaya Property Sdn Bhd directly to the assignor,

the assignor shall forthwith pay the same to the bank and until payment as aforesaid, the assignor holds the same in trust for the bank.

(18) The assignor hereby for valuable consideration irrevocably appoints the bank and the manager for the time being of the bank or the person for the time being in charge or any other person or body corporate appointed by the bank and his or their substitute or their substitutes to be the true and lawful attorney or attorneys of the assignor to:

(i) demand and receive from the said Mahajaya Property Sdn Bhd the balance of the contract sum and to collect and receive the same for the assignor by instalments or otherwise as the bank may think fit and proper and to give and execute all necessary receipts and discharges for the same with power to accept security and give time for payment and to draw bills for acceptance and to accept any negotiable instruments in payment of the balance of the contract sum or any part thereof.

(ii) take any legal or other proceedings authorized by law in the name of the assignor or the bank for the recovery of the balance of the contract sum or any part thereof in the event the said balance of the contract sum or any part thereof is not paid or remains unpaid.

(iii) Generally do all such other lawful acts as the bank as attorney thinks advisable for the purpose aforesaid as fully and effectually in all respects as the assignor could himself do.

(20) As a separate and independent stipulation, the assignor hereby agrees that this assignment shall be without prejudice to and shall not affect release or exonerate the right of the bank to recover from the assignor the amount of the Loan as principal debtor(s) whether or not the amount of the loan may be recovered from the said Mahajaya Property Sdn Bhd by reason of this assignment and the assignor further agrees to indemnify the bank against all claims arising from or all costs and expenses incurred in connection with the granting, giving, disbursing or the execution of this assignment or the collection of any monies due hereunder including all costs and disbursements on a solicitor and client basis.

The defendant and the assignor also entered into a supplementary agreement ('the supplementary agreement') on 2 November 1993. The material clauses of this agreement read as follows:

(1) By a deed of assignment in writing dated 2 November 1993 between Sepakat Tinggi Sdn Bhd of No 377E-1, Jalan Melor 1, Taman Peringgit Jaya, 75400 Melaka on the one part and Bank Of Commerce (M) Bhd a company incorporated in Malaysia and having its registered office at No 6 Jalan Tun Perak, 50050 Kuala Lumpur and carrying on business at No 170-172 Kompleks Munshi Abdullah, Jalan Munshi Abdullah 75100 Melaka on the other part, Sepakat Tinggi Sdn Bhd requested a loan from Bank of Commerce (M) Bhd to part finance the completion of the contract dated 29 September 1992 awarded by Mahajaya Properties Sdn Bhd to Sepakat Tinggi Sdn Bhd.

(2) The Bank of Commerce (M) Bhd has agreed to grant the loan to Sepakat Tinggi Sdn Bhd for the sum of RM2m subject to the latter assigning all monies due in the contract dated 29 September 1992 to the former as securities and towards repayment of the loan with interest.

(3) Sepakat Tinggi Sdn Bhd shall open a project account and all proceeds from the execution of the contract with the said Mahajaya Property Sdn Bhd will be deposited into this account to facilitate the repayment of the loan between Sepakat Tinggi Sdn Bhd and Bank of Commerce (M) Bhd.

It is hereby agreed by both parties in this supplementary agreement that all monies due by Mahajaya Property Sdn Bhd to Sepakat Tinggi Sdn Bhd in the contract dated 29 September 1992 shall be deposited into the Project Account No 09021259 which is held in Bank of Commerce (M) Bhd of 170-172 Kompleks Munshi Abdullah, Jalan Munshi Abdullah, 75100 Melaka. All cheques payable to Sepakat Tinggi Sdn Bhd shall be made in the following manner:

'Sepakat Tinggi Sdn Bhd A/C No 09021259'

And that all expenses incurred in the making of this supplementary agreement shall be borne by Sepakat Tinggi Sdn Bhd.

By its notice of demand dated 20 October 1995, the plaintiff alleged that the defendant did not pay progress payment Nos 22 to 26 amounting to RM694,886.98 into the project account as specified in cl 3 of the assignment. The material parts of the notice read as follows:

Re: Notice Before Action

We act for Bank of Commerce (M) Bhd of No 170–172 Kompleks Munshi Abdullah, Jalan Munshi Abdullah, 75100 Melaka.

Our client informs us that pursuant to a deed of assignment dated 2 November 1993 made between our clients and Sepakat Tinggi Sdn Bhd ('STSB'), STSB has assigned the balance of the contract sum due from yourselves to STSB to our client.

Our client further informs us that you have notice of the assignment by reason of a supplementary agreement of even date between yourselves and STSB wherein you have agreed to pay the proceeds from the contract to STSB's account with our client.

Our client further informs us that you have on 15 November 1994 paid a sum of RM122,457.59 into the said account being part payment of progress payment No 22 amounting to RM197,457.59.

Our client also informs us that you have also failed to pay the amount due on progress payment Nos 23, 24, 25 and 26 particulars of which are as follows:

Certificate of Progress Payment	Amount (RM)
No 22	75,000.00
No 23	177,112.56
No 24	128,242.65
No 25	64,697.99
No 26	249.833.78
	694.886.98

The plaintiff subsequently instituted proceedings for recovery of the said sum by its summons filed on 15 February 1996. Paragraph 8 of the statement of claim which specifies the amount that was utilized towards repayment of the loan from the amount paid into the project account reads as follows:

Jadual	Bayaran ke dalam Akaun Projek	Jumlah pembayaran yang dipotong untuk pembayaran pinjaman
18 November 1993	95,400.00	28,620.00
24 November 1993	40,000.00	12,000.00
30 November 1993	50,000.00	15,000.00
06 November 1993	250,000.00	75,000.00
08 November 1993	100,000.00	30,000.00
11 November 1993	150,000.00	45,000.00
16 November 1993	296,066.22	88,819.87
27 Disember 1993	100,000.00	30,000.00
03 Januari 1994	80,000.00	24,000.00
10 Januari 1994	100,000.00	30,000.00
15 Januari 1994	200,000.00	60,000.00
22 Januari 1994	30,217.33	9,065.20
25 Januari 1994	200,000.00	60,000.00
02 Februari 1994	198,026.26	59,407.88
07 Februari 1994	311,600.00	93,480.00
26 Februari 1994	102,299.26	30,689.78
08 Mac 1994	100,000.00	30,000.00
22 Mac 1994	120,560.00	36,168.00
29 Mac 1994	50,000.00	15,000.00
04 April 1994	50,000.00	15,000.00
09 April 1994	50,000.00	15,000.00
11 April 1994	60,000.00	18,000.00
18 April 1994	91,522.79	27,456.83
25 April 1994	50,850.00	15,255.00
29 April 1994	50,000.00	15,000.00
06 Mei 1994	25,000.00	7,500.00
24 Mei 1994	100,000.00	30,000.00
07 Jun 1994	50,000.00	15,000.00
14 Jun 1994	50,000.00	15,000.00
21 Jun 1994	100,000.00	60,000.00
30 Jun 1994	100,345.56	60,000.00
12 Julai 1994	49,328.30	29,596.80
12 September 1994	100,000.00	60,000.00
15 November 1994	122,457.59	73,452.51

The defendant filed its statement of defence on 27 March 1996. On 5 April 1996, the plaintiff filed an application for summary judgment before the SAR who dismissed it. This appeal is by the plaintiff against the order made by the SAR.

A At the hearing of the appeal before me, both parties agreed that the only issue for determination is whether there was an absolute assignment and that, if there was, the plaintiff would be entitled to succeed. I shall refer to the submissions of both parties in a later part of the judgment when I deal with the conditions necessary for the creation of an absolute assignment.

B At common law, a chose in action, like a contractual right, cannot be assigned so as to entitle the assignee to sue for its recovery in his own name. The assignee obtained a right against the assignor personally, but not an independent right of action against the debtor. An action for recovery must be brought by or in the name of the assignor. However, the C position in equity was different. As Cozens-Hardy J said in *Fitzroy v Cave* [1905] 2 KB 364 at p 372:

> At common law, such a debt was looked upon as a strictly personal obligation, and an assignment of it was regarded as a mere assignment of a right to bring an action at law against the debtor ... . But the Courts of Equity took D a different view ... . They admitted the title of an assignee of a debt, regarding it as a piece of property, an asset capable of being dealt with like any other asset, and treating the necessity of an action at law to get it as a mere incident.

In order to avoid the conflict in law and in equity, s 25(6) of the Judicature E Act 1873 introduced a statutory form of assignment which enabled the assignee of a legal chose in action to sue in his own name. This provision has now been replaced by s 136 of the Law of Property Act 1925. The Malaysian equivalent of the section is s 4 (3) which reads as follows:

> Any absolute assignment, by writing, under the hand of the assignor, not F purporting to be by way of charge only, of any debt or other legal chose in action, of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to receive or claim the debt or chose in actions, shall be, and be deemed to have been, effectual in law, subject to all equities which would have been entitled to priority over the right of the assignee under the law as it existed G in the State before the date of the coming into force of this Act, to pass and transfer the legal right to the debt or chose in action, from the date of the notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor.

As Gunn Chit Tuan J (as he then was) explained in *The Chartered Bank v* H *Rashid bin Mohamed* [1986] 2 MLJ 219, any debt or other legal thing in action may be assigned so as to vest in the assignee the legal right to the same and all the remedies therefor, with power to give a good discharge without the concurrence of the assignor if certain conditions, as stipulated in s 4(3), are complied with. The conditions are:

I (a) the assignment must be absolute, and not purport to be by way of charge only;

(b) the assignment must be in writing under the hand of the assignor; and

(c) express notice in writing of the assignment must be given to the debtor or other person from whom the assignor would have been entitled to claim the debt or thing in action.

I shall now consider in brief the law relating to the conditions as enumerated above, though not in the order as listed, in order to determine whether they have been complied with to enable me to make a finding on the nature of the assignment in the appeal before me.

(a) *The assignment must be in writing*

Though s 4(3) stipulates that the assignment must be in writing under the hand of the assignor, no particular form is necessary. The writing can be quite informal (see *Re Westerton, Public Trustee v Gray* [1919] 2 Ch 104; *The Kelo* [1985] 2 Lloyd's Rep 85). As *Chitty on Contracts* (27th Ed) Vol 1 says at para 19–007, a direction in writing by a creditor to his debtor to pay the assignee, handed to the assignee, may amount to an assignment (see *Brice v Bannister* (1878) 3 QBD 569; *Harding v Harding* (1886) 17 QBD 442; *Grey v Australian Motorists & General Insurance Co Pty Ltd* [1976] 1 NSWLR 669), but such a direction handed to the debtor will not by itself constitute an assignment unless there is evidence that the assignee has requested or consented to it (see *Curran v Newpark Cinemas Ltd* [1951] 1 All ER 295); and even if he has, the direction may constitute no more than authority to pay, and gives the assignee no rights.

As the assignment in this case is a properly executed agreement between the assignor and the assignee (the plaintiff) there was, rightly so, no submission by either party on this requirement.

(b) *Written notice must be given to the debtor*

Section 4(3) requires written notice in writing of the assignment to be given to the debtor. The purpose of the notice is to inform the debtor of the person to whom he has to pay the debt (see *Bank Bumiputra Malaysia Bhd & Anor v Lorrain Esme Osman & Ors* [1987] 1 MLJ 502). With regard to the form of the notice that must be given, useful reference may be made to *Van Lynn Developments Ltd v Pelias Construction Co Ltd* [1969] 1 QB 607 where Widgery LJ said at p 615:

> I agree and point out that the only formality required by the section is that express notice in writing be given to the debtor. The section does not speak of 'a notice'; it speaks of 'notice'. Accordingly, it is wrong to suppose that a separate document purposely prepared as a notice, and described as such, is necessary in order to satisfy the statute. The statute only requires that information relative to the assignment shall be conveyed to the debtor, and then it shall be conveyed in writing.

However, the notice should be clear and unambiguous. It must expressly or implicitly record the fact of assignment and must plainly indicate to the debtor that by virtue of the assignment the assignee is entitled to receive the money. If it merely indicates that on grounds of convenience payment should be made to a third party as agent of the creditor, the debtor is not

liable if he pays the creditor direct (see *James Talcott Ltd v John Lewis & Co Ltd and North American Dress Co Ltd* [1940] 3 All ER 592). Though the section does not prescribe any limit of time within which the notice must be given, it must be given before the assignee issues his writ (see *Compania Colombiana de Seguros v Pacific Steam Navigation Co* [1965] 1 QB 101). However, it only becomes effective at the date on which it is received by or on behalf of the debtor (see *Holt v Heatherfield Trust Ltd* [1942] 2 KB 1). It must be noted that payment to the creditor will be a good satisfaction of the debt or claim, notwithstanding that it may have been assigned, if the debtor or guarantor has no notice of the assignment (see *UMW Industries (1985) Sdn Bhd (formerly known as UMW (Malaya) Sdn Bhd) v Ah Fook @ Chin Kim Fook* [1996] 1 CLJ 379). Section 4(3) does not specify that the notice must be given by any particular person (see *Bateman v Hunt* [1904] 2 KB 530). In *UMW Industries (1985) Sdn Bhd (formerly known as UMW (Malaya) Sdn Bhd) v Ah Fook @ Chin Kim Fook* [1996] 1 CLJ 379, the Federal Court accepted the statement of law in *Curran v Newpark Cinemas Ltd* [1951] 1 All ER 295 where it was held that there is no requirement that the notice given to the debtor should necessarily have been given by the assignee.

In his submission, learned counsel for the defendant contended that no notice as required by s 4(3) was served on the defendant. He said that the notice of demand and the supplementary agreement, both of which I have reproduced in an earlier part of the judgment, do not meet the requirements of the section. With regard to the notice of demand that was issued by the plaintiff to the defendant, he said that it is defective as s 4(3) requires that such a notice must be issued by the assignor. With regard to the supplementary agreement, he said that it merely states that the money is to be paid into the named account and that it does not assign the debt as such. In his reply, learned counsel for the plaintiff contended that the notices to the defendant are valid and that they may be given at any time.

On the objection raised by the defendant that the notice of demand must have been issued by the assignor, the cases that I have referred to make it clear that s 4(3) does not specify that the notice must be given by any particular person. Thus, the objection raised cannot be sustained. In any event, it is unnecessary for me to go any further into the sufficiency of the notice of demand in view of what I have to say on the effect of the supplementary agreement. The objection to the supplementary agreement raised by learned counsel is also without any substance. Contrary to his submission, it:

(a) refers to the assignment between the plaintiff and the assignor;

(b) refers to the agreement;

(c) refers to the assignor assigning all moneys due from the contract sums to the plaintiff;

(d) refers to the project account to be opened by the assignor; and

(e) requires the defendant to deposit all moneys due into the project account.

It will therefore be seen that the supplementary agreement gives all the particulars of a notice required by s 4(3) and is clear and unambiguous. In accordance with the principle laid down in *James Talcott Ltd v John Lewis & Co Ltd and North American Dress Co Ltd* [1940] 3 All ER 592, it expressly records the fact of assignment and plainly indicates to the defendant that by virtue of the assignment, the plaintiff is entitled to receive the money. It must also be remembered that the defendant was a party to the supplementary agreement indicating that he had consented to the assignment thereby going beyond the requirement of notice prescribed by s 4(3). Thus, the argument that it is defective is wholly devoid of any merit and has only to be stated to be rejected. Accordingly, it is my view that a valid notice of the assignment has been given to the defendant.

(c) *The assignment must be absolute*

Section 4(3) requires that the assignment must be absolute and not purport to be by way of charge only. In order for there to be an absolute assignment, all the rights, title and interest of the assignor in the debt or chose in action must pass unconditionally to the assignee (see *Nouvau Mont Dor (M) Sdn Bhd v Faber Development Sdn Bhd* [1984] 2 MLJ 268; *Hipparion (M) Sdn Bhd v Chung Khiaw Bank Ltd* [1989] 2 MLJ 149). As Chitty LJ observed in *Durham Brothers v Robertson* [1898] 1 QB 765 at p 774:

> The section speaks of an absolute assignment of any debt or other chose in action. It does not say 'or any part of a debt or chose in action'.

An assignment by way of charge is one which does not absolutely transfer the property to the assignee (see *Hipparion (M) Sdn Bhd v Chung Khiaw Bank Ltd* [1989] 2 MLJ 149). It only gives a right to payment out of a particular fund or particular property, without transferring that fund or property (see *Tancred v Delagao Bay and East Africa Railway Co* (1889) 23 QBD 239). An illustration is provided by *Walter & Sullivan Ltd v J Murphy & Sons Ltd* [1955] 1 All ER 843 where the plaintiffs having become indebted to Hall & Co in the sum of £1,558 17s 8d gave the defendants a written authority and request 'to pay to (Hall & Co) ... the sum of £1,558 17s 8d from moneys owing by you to us ... the receipt of (Hall & Co) shall be good and sufficient discharge to you in respect of payment made hereunder'. It was held that the arrangement between the plaintiff and Hall & Co amounted to only an equitable assignment by way of charge of part of the debt alleged to be due from the defendants. In *Mercantile Bank of London v Evans* [1899] 2 QB 613, the plaintiff made an advance to a customer who executed an assignment in the following terms:

> In consideration of your placing to my credit today the sum of £200, I hereby assign to you the whole of my rights and interest under the agreement dated 1 June 1897 ... as security for the repayment on demand of the said sum of £200 and any further sum or sums that you may from time to time hereafter advance to me either directly or by way of overdraft or otherwise however, and I hereby appoint you my nominees in pursuance of the provisions of the said agreement, with power to exercise all my rights

A thereunder, either in my name or your own, and I hereby appoint you my irrevocable attorneys in that behalf.

Mathew LJ commenting on the effect of the assignment in the *Mercantile Bank*'s case in *Hughes v Pump House Hotel Co* [1902] 2 KB 190 said at p 195 :

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> ... general terms were used in making the assignment, but, when the whole instrument was looked at, it appeared that what was intended was only to assign so much of the debt or chose in action as would provide security for a debt of £200 ... . Upon that becoming apparent, it was held that the true character of the interest given was that of a charge only.

C An absolute assignment must also be distinguished from a conditional assignment. A conditional assignment is one which is to become operative or to cease to be operative upon the happening of an uncertain event. In *Durham Brothers v Robertson* [1898] 1 QB 765, a firm of builders executed the following document in favour of the plaintiffs:

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> Re Building Contract of Middle Class Dwellings, situate on the west side South Lembeth Road, SW — In consideration of money advanced from time to time we hereby charge the sum of 1080*l*, being the agreed price for the sale of 60*l*pa ground rent which will become due to us from John Robertson Esq of No 73 Posendale Road, West Dulwich, on the completion of the above buildings as security for the advances, and we hereby assign
> E our interest in the above-mentioned sum *until the money with added interest be repaid to you.* (Emphasis added.)

In ruling that the document amounted to a conditional assignment, Chitty LJ said at p 769:

> Now the document divides itself into two parts. First, there is a charge upon
> F 1080*l* for the advances; and, secondly, there is an assignment of the interest of Smith & Co in the 1080*l* in terms not absolute, but until the happening of an event, namely, the repayment of the advances with interest. On repayment of the advances and interest, the assignment, according to the import of the document, comes to an end.

G And at pp 772–773:

> The assignment before us complies with the terms of the enactment save one, which is essential: it is not an absolute but a conditional assignment. The commonest and most familiar instance of a conditional assurance is an assurance until JS shall return from Rome. The repayment of the money advanced is an uncertain event, and makes the assignment conditional.
> H Where the Act applies, it does not leave the original debtor in uncertainty as to the person to whom the legal right is transferred, it does not involve him in any question as to the state of the accounts between the mortgagor and the mortgagee. The legal right is transferred, and is vested in the assignee. There is no machinery provided by the Act for the revesting of the legal right to the assignor dependent on the performance of a condition, the
> I only method within the provisions of the Act for revesting in the assignor the legal right is by a retransfer to the assignor followed by a notice in writing to the debtor, as in the case of the first transfer of the right. The

> question is not one of mere technicality or of from: it is one of substance, relating to the protection of the original debtor and placing him in an assured position.

In explaining the conditional nature of the assignment in *Durham Brothers, Cheshire, Fifoot and Furmston's Law of Contract: Singapore and Malaysian Edition* by Andrew Phang Boon Leong says at p 726:

> In the present case, the whole sum due from Robertson was not assigned to the plaintiffs, but only so much of it as would suffice to repay the money actually advanced together with interest. The document stated in effect that when that amount was paid, which was an uncertain event, the interest of the assignee was automatically to cease. Thus the debtor, Robertson, became directly concerned with the state of accounts between the assignor and assignee, for he would not be justified under the document in making a payment to the latter after the money actually lent with interest had been repaid.

The test for determining whether an assignment is absolute or not is stated in *Chitty on Contracts* (27th Ed) Vol 1 at para 1396 in the following terms:

> The test seems to be, has the assignor unconditionally transferred to the assignee for the time being the sole right to the debt in question *as against the debtor*? If so, the assignment will be absolute; but if the debtor cannot tell whether to pay the assignor or the assignee without examining the state of accounts between them, it will be held to be by way of charge only. Much may depend on the language of the particular instrument; in construing it, the court will look at the whole of its language. The words italicised above are of crucial importance, for it is no concern of the debtor whether the assignor and assignee have some private arrangement for the disposal of the debt after it has been paid by the debtor.

Thus, the fact that the assignee is to hold the proceeds of the debt (see *Comfort v Betts* [1891] 1 QB 737; *Fitzroy v Cave* [1905] 2 KB 364), or the surplus proceeds beyond a stated amount (see *Burlinson v Hall* [1884] 12 QBD 347; *Bank of Liverpool and Martins Ltd v Holland* (1926) 43 TLR 29), on trust for the assignor does not prevent the assignment from being absolute.

In determining whether an assignment is absolute or not, all the terms of the instrument must be considered; and whatever may be the phraseology adopted in some particular part of it, if it is clear from the instrument as a whole that the intention was to pass all the rights of the assignor in the debt or chose in action to the assignee, then it will be an absolute assignment (see *Hughes v Pump House Hotel Co* [1902] 2 KB 190). The Federal Court in *Nouvau Mont Dor (M) Sdn Bhd v Faber Development Sdn Bhd* [1984] 2 MLJ 268 and *Hipparion (M) Sdn Bhd v Chung Khiaw Bank Ltd* [1989] 2 MLJ 149 said that whether or not an assignment is an absolute one (not purporting to be one by way of charge only) within the meaning of s 4(3) is to be gathered only from the four corners of the instrument itself. However, in *United Malayan Banking Corp Bhd v Aluminex (M) Sdn Bhd & Anor* [1993] 3 MLJ 587, the (then) Supreme Court held that in construing an assignment, evidence is admissible to show in what manner the assignment was related to existing facts pursuant to s 92(f) of

A the Evidence Act 1956, that is to say, the assignment would have to be construed not only by having regard to the words appearing therein, but also with regard to the surrounding circumstances. In *Nouvau Mont Dor (M) Sdn Bhd* and *Hipparion (M) Sdn Bhd*, it was held that the use of the word 'absolutely' in the document showed that the assignment was absolute.

B In his submission, learned counsel for the defendant contended that cll 9 and 18 of the assignment which authorize the plaintiff to use the name of the assignor as plaintiff or co-plaintiff and the appointment of the plaintiff as the attorneys of the assignor to institute proceedings against the defendant show that the assignment was not absolute. He also said that cl 20 lends support to his argument. In his submission, learned counsel for C the plaintiff said that the use of the word 'absolutely' in cl 1 of the assignment shows that the assignment is absolute. He said that the fact that the receipt of the money by the plaintiff shall be a good discharge of the debt to the assignor as provided by cl 5 supports his case. He added that the presence of cll 9 and 18 do not affect the absolute character of the D assignment and in support of this referred to *Khaw Poh Chhuan v Ng Gaik Peng & Yap Wan Chuan & Ors* [1996] 1 MLJ 761.

In my opinion, cll 9 and 18 of the assignment cannot be used to alter the absolute nature of the assignment if it can be established from the other circumstances of the case that the assignment is in fact absolute. This is for the reason that the right of an assignee to sue in his own name E is statutorily given by s 4(3) when the required conditions for the existence of an absolute assignment are present. In that event, the two clauses are superfluous and serve no useful purpose as the only person who can maintain an action is the assignee as the entire rights and interests of the assignor would have been transferred unconditionally to him thereby F rendering the powers contained in the clauses ineffective. This is inevitable as an assignor has no right to sue in his own name where there has been an absolute assignment of his rights (see *Bank of Tokyo Ltd v Mohd Zaini bin Arshad (Maria Pragasam, Intervener)* [1991) 3 MLJ 50). Thus, the question of the assignor lending his name to institute proceedings does not and cannot arise. In this regard, I refer to *Hughes v Pump House Hotel Co* G [1902] 2 KB 190 where Cozens-Hardy LJ said that in the case of an absolute assignment, the '... debtor can safely pay the assignee, and he is not concerned to inquire into the state of the accounts between the assignor and the assignee; nor does it matter that the assignee has obtained a power of attorney, and a covenant for further assurance from the assignor'. H In *Khaw Poh Chhuan v Ng Gaik Peng & Yap Wan Chuan & Ors* [1996] 1 MLJ 761, the Federal Court held that an assignment was absolute notwithstanding the fact that it contained a clause whereby the assignor agreed irrevocably to lend her name to the assignee for taking whatever steps necessary in respect of the property involved. Peh Swee Chin FCJ in writing for the court said at pp 774H–775A:

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> By far, the most important clause is cl 1 of the agreement dated 1 April 1964, set out above earlier. Clause 1 states that on the payment of RM6,000 to account of the price of RM15,000 the assignor sells, transfers and assigns all her interests, rights, etc to the assignee absolutely and free from all

encumbrances. A fair reading of cl 1, and nothing more will lead to the inevitable conclusion that such interests and rights, etc pass absolutely under this clause and such passing of such interests, etc are not dependent on other terms of this agreement or for that matter, both agreements have no term of any kind that really makes such passing of such interests, etc conditional as will be seen.

To my mind, the answer to the problem lies in cl 1 of the assignment which, at the risk of repetition, reads as follows:

> In consideration of the bank granting the loan to the assignor, receipt of which sum the assignor hereby acknowledges, the assignor hereby absolutely assigns to the bank the balance of the contract sum to hold the same into the bank absolutely *until the full amount of the loan and all interest thereon shall be fully paid and satisfied.* (Emphasis added.)

This clause is similar to the one found in *Durham Brothers v Robertson* [1898] 1 QB 765 to which I have referred in some detail in an earlier part of the judgment. The words that I have emphasized in cl 1 show that the assignment is to continue only till the full repayment of the loan and interest. On repayment of the loan and interest, the assignment comes to an end. The repayment of the loan advanced is an uncertain event and makes the assignment conditional. This would involve the defendant in the state of the accounts between the plaintiff and the assignor. Accordingly, it is my view that the assignment is not absolute. In this instance, therefore, the use of the word 'absolutely' in cl 1 does not render the assignment absolute. This finding, as agreed to by both parties, is sufficient to make a determination in this appeal.

In the upshot, I dismiss the appeal with costs.

Appeal dismissed.

Reported by K Tang-Wai